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No. 109

In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

NATIONAL INDUSTRIAL ALCOHOL COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

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CITATIONS

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OPINIONS BELOW

The findings of fact and opinion of the United States Board of Tax Appeals (R. 8–10) are reported in 7 B. T. A. 1241.

The opinion of the Court of Appeals of the District of Columbia (R. 24–27) is reported in 38 F. (2d) 718.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia, reversing in part the decision

of the Board of Tax Appeals, was entered February 4, 1930. (R. 28.) Rehearing was denied March 1, 1930. (R. 28.) Petition for a writ of certiorari was filed May 9, 1930 (R. 29), and granted by this Court on June 2, 1930 (281 U. S. 717).

Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Did Congress intend by Section 234 (a) (4) or Section 234 (a) (7) of the Revenue Act of 1918 to authorize a deduction for obsolescence or loss in value of tangible property caused by prohibition legislation?

STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, 1078:

> SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:
>
> * * * * *
>
> (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise;
>
> * * * * *

(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence;

* * * * *

STATEMENT

This case reached the Court of Appeals of the District of Columbia on the petition of the National Industrial Alcohol Company, respondent herein, for a review of the decision of the Board of Tax Appeals redetermining deficiencies in respondent's income and profits taxes for the fiscal years ended May 31, 1919, and May 31, 1920. The record contains both the findings of the Board (R. 8–9) and a brief statement of the evidence (R. 14–19).

Before the Board, the taxpayer sought to establish the right to deductions resulting from the asserted obsolescence of good will, trade-marks and trade brands, and also of vats and a building on account of prohibition legislation. The Board disallowed the claims on account of intangible property and on account of the building, but allowed a deduction on account of the vats. (R. 10, 11.) The taxpayer alone petitioned for a review of its determination. The Court of Appeals of the District of Columbia affirmed the decision as to intangible property but held that the taxpayer was entitled to a deduction for loss sustained as to the building. (R. 28.) As the Commissioner alone applied for

writ of certiorari, the only question is as to the building, and only such facts as relate to it will be alluded to here.

The taxpayer was a corporation organized under the laws of Louisiana in 1911 for the purpose of manufacturing, bottling, and selling beer. On November 3, 1919, it abandoned the manufacture of alcoholic beer and entered upon the manufacture of "near beer." It continued this business until 1923. (R. 8.)

In August, 1921, the taxpayer began to manufacture and sell industrial alcohol, as a separate enterprise, and the buildings as to which the deduction was claimed were not used for the manufacture or sale of industrial alcohol and are not involved in this case. (R. 8, 18.)

For the manufacture of alcoholic beer the taxpayer had two brick buildings, one designated as "the brewery building" and the other as "the cellar building." After prohibition the brewery building and one floor of the cellar building were used in the manufacture of "near beer." Two floors in the cellar building and the vats contained therein were not used. (R. 9.)

The abandoned floors contained vats or tanks for the fermentation and aging of beer which apparently were not needed for the manufacture of the quantity of "near beer" which the taxpayer produced. (R. 17.)

The only deduction on account of obsolescence of buildings which the taxpayer asserted in its petition to the Court of Appeals was on account of abandonment of these two floors of the cellar building. The petition alleged that the depreciated cost of the entire building was "proven by the evidence" (R. 13), and the opinion of the Board of Tax Appeals stated that the evidence was sufficient to permit a computation to be made of this item (R. 10). But neither the Board nor the court below made such a computation.

The Board, in its opinion, said of that building of which a part was abandoned (R. 10):

> * * * there is nothing in the record to indicate that this structure was obsolete or becoming so. It is not sufficient to sustain a deduction to show only that the building can not be used in the petitioner's business. It is entirely possible that such a building was convertible for use in some other business in which refrigeration was necessary. There is no evidence that any effort was made to dispose of the building or to find any other use for it. The action of the commissioner in refusing to allow any obsolescence on the building must be approved.

The court below stated that the testimony showed that "neither of the two floors abandoned * * * had any value to appellant [the taxpayer] after November 3, 1919." (R. 27.) In the abstract of the evidence is the statement that the two floors

in the cellar building which were not used have never "had any value to the company [the taxpayer] since prohibition." (R. 18.)

The only specification of error is predicated upon the Government's contention that the statute did not permit any deduction for obsolescence caused by the proscription of a business by prohibition legislation. Consequently, we are not in a position to raise the question whether the evidence establishes obsolescence of the property in question, if it be assumed that there can be any deduction for obsolescence owing to prohibition legislation.

SPECIFICATION OF ERROR TO BE URGED

The court below erred in holding that, where tangible assets are abandoned because the business in which they are used is proscribed by prohibition legislation, the taxpayer sustains a loss for which a deduction from income may be taken under the Revenue Act of 1918, Section 234 (a) (4) or Section 234 (a) (7).

ARGUMENT

We maintain that Congress did not intend to provide compensation in any form for losses caused by prohibition legislation and that neither Section 234 (a) (4) nor Section 234 (a) (7) of the Revenue Act of 1918, *supra*, authorized the deduction claimed. The arguments in support of this position are made on pp. 9–13 of the brief for the petitioner in *Burnet, Commissioner,* v. *Niagara*

Falls Brewing Company et al., No. 61, October Term, 1930, to which reference is hereby made. Copies of that brief have been furnished to counsel for respondent herein.

CONCLUSION

The judgment of the Court of Appeals of the District of Columbia should be reversed, and the order of the Board of Tax Appeals should be affirmed.

Respectfully submitted.

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